IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 5219 of 1997
WITH
CRIMINAL MISC.APPLICATION No. 5288 of 1997
WITH
CRIMINAL MISC.APPLICATION No. 5221 of 1997

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANTILAL R PATEL & 1 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR AV PRAJAPATI for petitioners,
MR KT DAVE ADDL.PUBLIC PROSECUTOR for Respondent(s) : 1,
MR AB PATEL LIQUIDATOR of Respondent No. 2 Bank,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 21/09/2007

ORAL JUDGMENT

1. As the common question of facts and law arises in these petitions, they are being disposed of by this common judgement and order.

2. Criminal Misc.Application No.5219 of 1997 is filed by the petitioners – original accused for appropriate order to quash and set aside the criminal complaint being Criminal Case No.4456 of 1995 pending in the court of learned Metropolitan Magistrate, Court No.9, Ahmedabad as well as order dtd.12/7/1996 passed by the learned Metropolitan Magistrate, Court No.9, Ahmedabad issuing summons upon the petitioners for the offence punishable under section 138 of the Negotiable Instruments Act (hereinafter shall be referred to as “N.I. Act” for short).

3. Criminal Misc.Application No.5288 of 1997 is filed by the petitioners – original accused for appropriate order to quash and set aside the criminal complaint being Criminal Case No.809 of 1997 pending in the court of learned Metropolitan Magistrate, Court No.9, Ahmedabad as well as order dtd.20/4/1997 passed by the learned Metropolitan Magistrate, Court No.9, Ahmedabad issuing summons upon the petitioners for the offence punishable under section 138 of the Act.

4. Criminal Misc.Application No.5221 of 1997 is filed by the petitioners – original accused for appropriate order to quash and set aside the criminal complaint being Criminal Case No.4457 of 1995 pending in the court of

learned Metropolitan Magistrate, Court No.9, Ahmedabad as well as order dtd.12/7/1996 passed by the learned Metropolitan Magistrate, Court No.9, Ahmedabad issuing summons upon the petitioners for the offence punishable under section 138 of the Act.

5. The aforesaid criminal complaints being Criminal Case Nos.4456 of 1995, 809 of 1997, and 4457 of 1995 are filed by the respondent No.2 herein – Manager of complainant bank namely General Cooperative Bank Limited against the petitioners in the Court of learned Metropolitan Magistrate, Court No.9, Ahmedabad for the offence punishable under sec.138 of N.I. Act alleging inter-alia that the accused persons are holding the post of Chairman / Secretary of one Swetanjali Co-operative Housing Society Limited; they had taken benefit of loan facility on behalf of the society; the accused are having their accounts in the name of Swetanjali Co-operative Housing Society Limited ; the account was being operated with the signature of the Chairman and Secretary; that the accused had given the cheques in question in favour of the complainant bank towards the loan which was given to the society and when the said cheques were presented, they were returned with an endorsement

"insufficient fund". It is further averred in the complaints that thereafter the statutory notices were given to the respective petitioners – accused persons under the provisions of N.I. Act and inspite of receipt of the aforesaid notices, the amounts under the cheques in questions were not paid and therefore, the complaints came to be filed. That the learned Metropolitan Magistrate, Court No.9, Ahmedabad issued process upon the petitioners in the aforesaid criminal complaints / cases and being aggrieved by and dissatisfied with the same, the petitioners have preferred these petitions under sec.482 of the Code of Criminal Procedure to quash and set aside the impugned criminal complaints / cases as well as the orders passed by the learned Metropolitan Magistrate issuing summons upon the petitioners for the offence punishable under sec.138 of N.I. Act.

6. Mr.Prajapati, learned advocate appearing on behalf of the respective petitioners – original accused has submitted that so far as the petitioner No.1 is concerned, he was not connected in any manner with the society and the cheques in question were neither signed / issued by him, nor he was holding any post in the society. Therefore, it is submitted that so far as the petitioner No.1 is concerned,

he cannot beheld liable for the dishonour of the cheques in question.

So far as the petitioner No.2 is concerned, it is submitted that in reply to the statutory notice itself, it was pointed out that at the time of taking loan, as per the practice, the bank took all the cheques in advance and so far as the petitioner No.2 is concerned, there cannot be any personal liability on his part, because at the relevant time he had signed and issued the cheques in the capacity as a Secretary of the society. It is further submitted that subsequently in place of of office bearers of the society, one Mr.B.D. Dave was appointed as Custodian and the said Mr.B.D. Dave took charge of the society including financial affairs of the society and the entire administration was in the hands of said Mr.B.D. Dave as custodian. It is submitted that in fact, the custodian had taken the charge on and from 1/7/1995 pursuant to the order dtd.16/12/1994 passed by the District Registrar, Cooperative Societies, Gujarat State, and after handing over the charge of the society to the custodian, the petitioners wrote letter to the complainant bank on 7/7/1995 informing the bank that the custodian has taken over charge charge of the society and

therefore, advance chaques received by them from the society may not be deposited in the bank and the same may be returned back to the society. It is submitted that inspite of the aforesaid instructions from the society in writing, the complainant bank presented the cheques in question and therefore, for the dishonour of the cheques in question, the petitioners cannot be held liable for the offence punishable under sec.138 of the N.I.Act. It is further submitted that even the complainant bank was also informed that new cheques may be obtained from the custodian. It is submitted that since June, 1995, they were not in-charge of the affairs of the society and therefore, proceedings under sec.138 of the N.I. Act requires to be quashed and set aside.

7. In all these petitions earlier Mr.M.I. Patel, learned advocate was appearing on behalf of the respondent No.2 – original complainant. However, during the pendency of the present proceedings, Mr.M.I. Patel has expired and it was brought to the notice of the Court that even the complainant Bank - General Cooperative Bank Limited has gone into liquidation and liquidator is appointed by the Registrar, Cooperative Societies and therefore, Mr.K.T. Dave, learned Additional Public

Prosecutor who is appearing on behalf of the State in these petitions, was requested to see that the concerned liquidator of the complainant Bank remain present to assist the Court and considering the smallness of the amount involved in the matters, the bank may not have to incur further expenditure for engaging lawyer. Accordingly, Mr.A.B. Patel, liquidator of complainant Bank has remained present. He has discussed the matter with Mr.K.T. Dave, learned Additional Public Prosecutor and has requested to pass appropriate order. However, has requested that liberty to initiate appropriate proceedings against the Swetanjali Co-operative Housing Society Limited and its members for recovery of the amount due and payable to the complainant Bank and Liquidator may be reserved.

8. Heard the learned advocates appearing on behalf of the respective parties as well as Mr.A.B.Patel, liquidator of the complainant Bank – respondent No.2.

9. At the outset, it is required to be noted that the cheques in question were given by the petitioner No.2 as a Secretary of Snehanjali Co-operative Housing Society Limited, in advance towards the installments of loan to be paid by Swetanjali Cooperative Housing Society Limited,

to the complainant Bank. It is also born out from the record that pursuant to the order passed by the District Registrar, Cooperative Societies, State of Gujarat dtd.16/12/1994, one Mr.B.D. Dave, was appointed as custodian of Swetanjali Cooperative Housing Society Limited, who took over the charge of the society including the financial affairs of the society and entire administration on 1/7/1995. Thus, with effect from 1/7/1995, the entire administration of the society including financial affairs of the society was in the hands of Mr.B.D.Dave, as custodian. After handing over the charge of the society to the custodian, the petitioner No.2 wrote letter to the complainant bank on 7/7/1995 informing the bank that the custodian has already taken over the charge and therefore whatever advance chaque they had given, may be returned back and those cheques may not be encashed in the bank and that new cheques be collected from the custodian. Inspite of the aforesaid communication dtd.7/7/1995, the impugned cheques dtd.20/9/1995 (Criminal Case No.4456 of 1995), cheque dtd.20/12/1997 (Criminal Case No.809 of 1997) and cheque dtd.20/9/1995 (Criminal Case NO.4457 of 1995) came to be deposited by the complainant bank. Not only

that even in the reply to the statutory notices also, the changed circumstances were pointed out. Thus, at the relevant time when the cheques were deposited, the petitioner No.2 was not holding the post of Secretary of the society, but the custodian was in charge of the entire administration including the financial affairs of the society. Thus, as such in view of the communication dtd.7/7/1995, respondent No.2 – complainant bank ought not to have deposited the cheques in question which were bound to be returned and ought to have returned the cheques and got the fresh cheques from the custodian. Under the circumstances and in the facts and circumstances of the case, the complaint against the petitioner No.2 – the then Secretary requires to be quashed and set aside in exercise of the powers under sec.482 of the Code of Criminal Procedure.

So far as the petitioner No.1 is concerned, it is not appreciable as to how he can be held liable and/or responsible for the dishonour of the cheques in question. The respondent No.1 was never holding any post in the society. He has neither signed the cheques nor issued the cheques in question and therefore, he cannot be held

liable for the dishonour of the cheques in question for the offence punishable under sec.138 of the N.I. Act and therefore, to continue the criminal proceedings against him would be abuse of process of court and unnecessary harassment to the petitioner No.1. In the facts and circumstances of the case, the impugned complaints are required to be quashed. However, liberty is also required to be reserved in favour of the complainant bank which is under liquidation and/or liquidator to initiate appropriate proceedings against the Swetanjali Cooperative Housing Society Limited and/or its members for recovery of the amount due and payable to the complainant Bank.

10. For the reasons stated above, all the petitions succeed. The impugned criminal complaints being Criminal Case Nos.4456 of 1995, 809 of 1997 and 4457 of 1995 pending in the court of learned Metropolitan Magistrate, Court No.9, Ahmedabad as well as orders passed thereon, issuing summons upon the petitioners for the offence punishable under section 138 of the Act, are hereby quashed and set aside. However, the same would be without prejudice to the rights and contentions of the respondent No.2 Bank – original complainant, and the liquidator of the complainant bank to initiate appropriate

proceedings for recovery of the amount due and payable by the Swetanjali Cooperative Housing Society and its members to the complainant Bank. Thus, it goes without saying that it will be for the complainant bank and/or liquidator of the complainant bank - respondent No.2 to initiate appropriate proceedings before the appropriate Court / forum for recovery of the loan amount due and payable by the Swetanjali Cooperative Housing Society Limited and/or its members to the complainant bank – respondent No.2. Rule is made absolute accordingly.

[M.R. SHAH,J.]

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